**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JENNY LYNN RACY** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,032,231 |
| **STAFF MANAGEMENT** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **AMERICAN HOME ASSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the July 18, 2007 preliminary hearing Order of Administrative Law Judge Thomas Klein. Claimant was awarded medical treatment, with respondent ordered to provide a list of three qualified physicians from which claimant would designate an authorized treating physician.

Claimant appeared by her attorney, Kala A. Spigarelli of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, John A. Pazell of Lenexa, Kansas.

The Appeals Board (Board) adopts the same stipulations as the Administrative Law Judge (ALJ), and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held July 11, 2007, with the attached exhibits; and the documents filed of record in this matter.

## ISSUES

1. Did claimant's ongoing shoulder injuries arise out of and in the course of her employment with Staff Management? If so, were they aggravated and worsened by her subsequent employment at Cessna?

2. Is it more probable than not that claimant's "disuse"[1] of her left arm was caused by the original injury and that the subsequent activities had little or no effect on her condition? Respondent argues the preponderance of the evidence supports a finding that claimant's subsequent employment with Cessna aggravated her left shoulder injury. Claimant argues the shoulder was injured while working for respondent and the condition never worsened with her later job duties.

## FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant injured her left shoulder on June 12, 2006, while working for respondent, Staff Management. She was working for respondent at Amazon.com. Claimant was working in the pallet department. On June 12, while she was unloading a truck, she reached up to get a box. While pulling on the box, the box fell, hitting her on the left shoulder. The box, which was full of books, weighed over 50 pounds.[2]

Claimant immediately felt a very sharp pain in her left shoulder which was hurting "very bad," with the pain being located at the place where her shoulder and arm connect.[3]

Claimant's supervisor (the lead man) was advised of claimant's accident on the same day as it occurred. He told claimant to go to Med Corps. Med Corps is located at Amazon's facility. Claimant went there on the same day as the accident. At Med Corps, they put an ice pack on her shoulder and told claimant that it was probably a contusion. Claimant did not request to see a doctor on the date of accident. The nurse at Med Corps put claimant on light duty. Claimant's light duty at Amazon included painting and sweeping duties, which she performed until she left respondent.

After the accident, claimant continued to have pain. The pain did not get any better.

Claimant was told to return to Med Corps every morning and they would put another ice pack on. They also provided her with Ibuprofen. Claimant went to Med Corps two or

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[1] Preliminary hearing Order of July 18, 2007.

[2] P.H. Trans. at 12.

[3] P.H. Trans. at 13.

three times a week at least. They still thought that it was a contusion and that it would take time to heal. There are nurses at Med Corps, but there are no doctors.

Claimant asked on several occasions about seeing a doctor and possibly having an x-ray. After much discussion between claimant and the personnel at Med Corps, an appointment was finally made for her to see William R. Black, M.D. This was a couple of weeks after the accident. Over this period of time, claimant continued working for Amazon, but on light duty. The light duty included painting and sweeping. Any activities she did at work caused her to experience pain in her shoulder.

Claimant was examined by Dr. Black on June 27, 2006. Claimant testified that Dr. Black did "a very light examination." Dr. Black told claimant it was a contusion and that it would take time to heal. He did not do any testing and he did not send her for any x-rays or an MRI.

Dr. Black suggested physical therapy twice a week for two weeks. Claimant did not attend the physical therapy because she did not feel like it would do any good, and she was afraid the physical therapy would injure her shoulder further. Claimant also did not feel that Dr. Black did a good enough examination to warrant going. Claimant was scheduled for a return appointment with Dr. Black on July 12, 2006, but apparently did not attend.

After seeing Dr. Black, claimant went back to work at respondent. She continued on light duty.

At the preliminary hearing, claimant stated that she thought it was at the end of July 2006 that she left her employment at respondent. At her deposition, claimant testified that she thought it was in June 2006 that she resigned her job with respondent.[4] Until she left her employment with respondent, claimant continued on light duty. Her shoulder was not getting any better. During that time, she still had the same pain in her shoulder as she had had when it was originally injured. The pain never went away.

Claimant quit her job with respondent approximately two weeks after the date of accident. She quit because she could not do the work at Amazon and because they would not move her to a different position or "try me in anything." Claimant asked about this several times. Claimant acknowledged that it is probably true that she resigned her job at respondent right around the time of her appointment with Dr. Black, who she saw on June 27. But, in claimant's deposition, claimant testified that she quit her job with

[4] The deposition of claimant, taken on January 25, 2007, was marked Respondent's Exhibit 1 at the preliminary hearing.

respondent after returning from Texas.[5] Claimant voluntarily resigned from respondent. They called claimant and asked her if she was going to return to work, and claimant told them no. When claimant quit, she did not have another job lined up.

At some point after leaving respondent, claimant contacted a temporary service called Express Personnel. When claimant went to Express Personnel, she did not inform them of her work restrictions. Express Personnel was not aware any work restrictions imposed by Dr. Black.

Through Express Personnel, claimant got a job at Cessna. She began working there on July 10, 2006. Claimant testified that at Cessna she worked four days a week, 10 hours a day. When claimant first started work at Cessna, her initial job duties involved sitting at a desk, putting together small parts called baffles, using either a screw, bolt or rivet. Claimant stated that this was "very light, light work." She performed those duties for approximately eight weeks. Claimant was able to do that work. However, her shoulder was still hurting.

While working at Cessna, claimant contacted respondent about going to the doctor again. Respondent's workers compensation insurance carrier scheduled an appointment with Dr. T. M. Venkat for a second opinion. Claimant first saw Dr. Venkat on August 18, 2006. Dr. Venkat's August 18 office note states that claimant discussed with Dr. Venkat the injury where she was struck on the left shoulder by a box while unloading a truck. She reported that she continued to have pain and she could not lift her arm above shoulder level. He diagnosed her with a left shoulder sprain and contusion left supraspinatus area. Dr. Venkat had claimant undergo ultrasound two or three times. She followed up with Dr. Venkat on August 25, 2006. His August 25 note states that claimant stated she "is feeling slightly better." Claimant reported to him at that time that she had started working at Cessna, "where she does not use her left hand at all" and "mostly uses the right hand to fix small parts." At some point, Dr. Venkat put her on light duty.

After working at Cessna for approximately eight weeks, claimant was transferred to a new position where she had to put bigger parts together, requiring her to hold a bucking bar in her left hand and a rivet gun in her right hand. The bucking bar is a heavy piece of metal which weighed a maximum of five pounds. She did that job for two weeks.

Claimant tried to do this work for a couple of weeks, but advised Cessna that she could not do it. She was having to hold the bucking bar all day, sometimes holding the bucking bar over her head. Claimant stated that it hurt when her arm was elevated. She ended up quitting the Cessna job, resigning because the bucking bar was too heavy and

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[5] Claimant's testimony was that, about two or three days after seeing Dr. Black, claimant had a family emergency and had to go to Texas. This family emergency did not have anything to do with her quitting her job with respondent. It was just a coincidence.

she could not do the work. The pain got worse and she just could not do it anymore, and she chose not to injure herself anymore. Her last day of work at Cessna was September 6, 2006.

Dr. Venkat ordered an MRI, which was performed on September 14, 2006. Claimant followed up with Dr. Venkat on September 26, 2006. At that time, he reviewed the MRI and indicated claimant had minimal tendonitis in the rotator cuff area, but no tear was seen. Dr. Venkat told claimant that she needed to see an orthopedic surgeon, but respondent did not allow claimant to seek any further treatment after she got Dr. Venkat's recommendation. Dr. Venkat's report of September 26 notes that claimant quit her current job because it was getting too much for her.[6]

Claimant saw Scott A. Compton, D.O., on February 8, 2007, for an evaluation of her left shoulder. Claimant confirmed that she gave Dr. Compton an accurate history of her shoulder complaints and the injury. Under the heading of Chief Complaint, Dr. Compton's report states that claimant had an injury on June 12, 2006, while she was unloading boxes and one of the boxes struck her on the left shoulder. She subsequently had pain at her left shoulder and has had that pain since the injury. The report goes on to state that claimant subsequently left that job and began working for Cessna, where initially she was doing very light work with her arms in a lower position. When she was doing that work, she tolerated her job well. Claimant was moved to a different job where she was using a rivet gun and she was putting her arms in a more elevated position. When she was doing that work, she had a significant increase in her shoulder pain. The report further states that claimant was unable to continue doing that work, and she left that place of employment after less than three months.[7]

Dr. Compton opined that the June 12, 2006 injury initiated claimant's left shoulder pain and the work claimant did at Cessna aggravated her shoulder symptoms. He noted that claimant most likely started out with a shoulder contusion. Due to the pain claimant was having at her shoulder, claimant restricted the use of her left arm and she had subsequently developed adhesive capsulitis.[8] Dr. Compton recommended some treatment for claimant, but the insurance company never provided this recommended treatment.

Claimant saw board certified orthopedic surgeon Edward J. Prostic, M.D., at the request of her attorney on March 23, 2007. Claimant also gave Dr. Prostic an accurate history of her injury and ongoing shoulder condition. Dr. Prostic's March 23 report[9] states

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[6] P.H. Trans., Resp. Ex. 2.

[7] P.H. Trans., Resp. Ex. 3.

[8] P.H. Trans., Resp. Ex. 3.

[9] P.H. Trans., Cl. Ex. 1.

that claimant's "initial injury occurred June 22, 2006 [*sic*]," when claimant was struck on the shoulder by a box while working for respondent. The report also states claimant continued to be symptomatic through the time that she left employment with respondent. The report goes on to state that claimant "has had worsening of her shoulder with repetitious activity for the next employer." Dr. Prostic diagnosed claimant with a small rotator cuff tear and recommended surgery.

Claimant has been receiving unemployment benefits at $272 per week since October 2006. Claimant did not inform unemployment that she was under any work restrictions, as she testified she was not under any restrictions.

Claimant testified that her shoulder pain is still as bad as it had been since the day of the accident with respondent. Her shoulder had never stopped hurting. Any activity she does with her shoulder causes her to have pain.

Between September 6, 2006, when claimant left the Cessna job, and the time of her deposition on January 25, 2007, claimant had not gotten a job. Since that time, claimant has found employment. In March 2007, claimant got a job as a cook at a bar and grill, working five hours a day, three days a week. Her duties include cooking and sweeping. Many of the activities claimant does in the cooking job irritate her shoulder. Her shoulder has hurt since the day the accident happened. It has never gotten any better. Claimant testified that it has not gotten any worse.

Claimant was under no restrictions at the time of her January 25, 2007 deposition.

Claimant never reported to anybody at Cessna or Express Personnel that she was having shoulder pain.

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[10]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[11]

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[10] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[11] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[12]

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[13]

However, the Kansas Supreme Court, in *Stockman,*[14] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* Court found this to be a new and separate accident.

In *Gillig,*[15] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The District Court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*,[16] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The Court, in *Graber*, found that its claimant had suffered a new injury,

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[12] K.S.A. 2005 Supp. 44-501(a).

[13] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[14] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[15] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[16] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[17]

There is no doubt that this claimant suffered an accidental injury arising out of and in the course of her employment with respondent while working at Amazon. The question which remains is, what effect did claimant's subsequent employment have on her condition? Claimant's testimony is consistent that her condition was not affected by the work with Cessna. However, the medical records to a certain degree contradict claimant's contentions. The report of Dr. Venkat of August 25, 2006, notes claimant was slightly better. But the next report of September 26, 2006, indicates claimant quit her job with Cessna because "it is getting too much for her to do it".[18] Dr. Compton's report of February 8, 2007, states claimant suffered an injury on June 12, 2006, which "initiated the pain at the left shoulder." But goes on to state that the "work that she did at Cessna aggravated her shoulder symptoms."[19] Even the March 23, 2007 report of Dr. Prostic, claimant's own doctor, notes that claimant had a worsening of her shoulder with repetitious activity for the next employer.[20] However, in *Logsdon*,[21] the Kansas Court of Appeals stated:

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

This Board Member finds that based on the logic of *Logsdon*, claimant suffered an original injury arising out of and in the course of her employment with respondent which never fully healed, even while working for Cessna.

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[17] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[18] P.H. Trans., Resp. Ex. 2.

[19] P.H. Trans., Resp. Ex. 3.

[20] P.H. Trans., Cl. Ex.1.

[21] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 3, 128 P.3d 430 (2006).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[22] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

Claimant suffered an accidental injury arising out of and in the course of her employment with respondent on June 12, 2006. That injury may have been temporarily aggravated by claimant's subsequent employment with Cessna. However, claimant's ongoing need for medical treatment stems from the original injury suffered during claimant's employment with respondent at Amazon.

## DECISION

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated July 18, 2007, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of October, 2007.

BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
John A. Pazell, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[22] K.S.A. 44-534a.